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BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER  
Chairman  
WILLIAM A. MUNDELL  
Commissioner  
JEFF HATCH-MILLER  
Commissioner  
MIKE GLEASON  
Commissioner  
KRISTIN K. MAYES  
Commissioner

Arizona Corporation Commission

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IN THE MATTER OF THE PETITION OF  
DIECA COMMUNICATIONS, INC. dba  
COVAD COMMUNICATIONS  
COMPANY FOR ARBITRATION OF AN  
INTERCONNECTION AGREEMENT  
WITH QWEST CORPORATION

DOCKET NO. T-03632A-04-0425

**QWEST CORPORATION'S COMMENTS RELATING TO THE EFFECT OF  
THE FCC'S INTERIM UNBUNDLING RULES AND NOTICE OF PROPOSED  
RULEMAKING**

**I. INTRODUCTION**

Pursuant to the discussion at the prehearing conference, Qwest Corporation ("Qwest") submits these comments relating to the effects of the FCC's interim unbundling rules and Notice of Proposed Rulemaking ("*Interim Rules*" and "*Unbundling NPRM*")<sup>1</sup> on the issues presented in Covad Communications Company's ("Covad") petition for arbitration.

<sup>1</sup> Order and Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179 (rel. Aug. 20, 2004). On August 23, 2004, Qwest, Verizon, and the United States Telecom Association challenged the lawfulness of the *Interim Rules* in a petition for a writ of mandamus filed with the D.C. Circuit. While Qwest strongly believes that the *Interim Rules* are unlawful and that a writ of mandamus should issue, the rules are of course still in effect. Accordingly, this brief discusses the legal effects of the *Interim Rules* on Covad's unbundling demands, (footnote continued on next page)

1 As discussed below, the *Interim Rules* and the *Unbundling NPRM* have two direct, material  
2 effects on the issues presented in this arbitration. First, the *Interim Rules* require incumbent local  
3 exchange carriers ("ILECs") to continue providing enterprise market loops, dedicated transport,  
4 and switching pursuant to the same rates, terms, and conditions that applied to these network  
5 elements under interconnection agreements ("ICAs") that were in effect on June 15, 2004. Under  
6 these rules, this Commission does not have authority to impose any terms and conditions relating  
7 to these elements that are different from those included in the current Qwest/Covad ICA that was  
8 in effect on June 15, 2004. This restriction prohibits the Commission from ordering some of the  
9 terms that Covad seeks to impose in its proposed ICA, including, for example, Covad's proposed  
10 provisions that would require Qwest to commingle enterprise market loops, dedicated transport,  
11 and switching with other network elements and wholesale services.  
12

13  
14 Second, in the *Unbundling NPRM*, the FCC stated that it will issue final network unbundling  
15 rules expeditiously. As Qwest discussed in its reply in support of its motion to dismiss portions  
16 of Covad's arbitration claims, the FCC's expected release of final rules within the next several  
17 months weighs strongly in favor of rejecting the broad network unbundling proposals that Covad  
18 is advocating. These proposals, if adopted, would allow Covad to claim virtually unlimited  
19 access to the elements that comprise Qwest's network regardless whether the elements meet the  
20 unbundling "impairment" standard set forth in section 251(d)(2)(B) of the Telecommunications  
21 Act of 1996 ("the Act"). In contrast, the FCC's attempt to craft final unbundling rules that comply  
22 with the rulings of the United States Court of Appeals for the District of Columbia Circuit in  
23  
24

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25 (footnote continued from previous page)

26 notwithstanding the pending petition.

1 *United States Telecom Association v. FCC* ("USTA II")<sup>2</sup> is likely to result in further narrowing of  
2 ILEC unbundling obligations. Thus, there is a strong likelihood that adoption of Covad's broad  
3 unbundling demands would produce direct conflicts with the final unbundling rules that the FCC  
4 will soon release. To avoid these unlawful conflicts and the confusion they would cause, the  
5 Commission should reject Covad's unbundling proposals.  
6

## 7 **II. DISCUSSION**

### 8 **A. The Interim Unbundling Rules Limit The Authority Of State** 9 **Commissions To Order Terms And Conditions Relating To Access To** 10 **Enterprise Loops, Dedicated Transport, And Switching.**

11 The FCC's *Interim Unbundling Rules*, released August 20, 2004, require ILECs "to continue  
12 providing unbundled access to enterprise market loops, dedicated transport, and switching under  
13 the same rates, terms and conditions that applied under their interconnection agreements as of  
14 June 15, 2004."<sup>3</sup> The FCC ordered that these rates, terms, and conditions must remain in effect  
15 "until the earlier of the effective date of final unbundling rules promulgated by the [FCC] or six  
16 months after Federal Register publication of [the *Interim Unbundling Rules*]...."<sup>4</sup>

17 Under these rules, therefore, Qwest and Covad are bound by the rates, terms, and conditions in  
18 their existing ICA that was in effect on June 15, 2004, relating to access to enterprise market  
19 loops, dedicated transport, and switching. The FCC's intent in issuing the *Interim Unbundling*  
20 *Rules* is to preserve "legal obligations" as of June 15, 2004.<sup>5</sup> Accordingly, with limited  
21 exceptions that do not apply here, the *Interim Unbundling Rules* forbid state commissions from  
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23

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24 <sup>2</sup> 359 F.3d 554 (D.C. Cir. 2004).

25 <sup>3</sup> *Interim Unbundling Rules and Unbundling NPRM* at ¶ 1.

26 <sup>4</sup> *Id.*

1 ordering any different terms or conditions.<sup>6</sup>

2 This prohibition precludes the Commission from adopting any of Covad's demands in this  
3 arbitration relating to access to the elements addressed in the *Interim Rules* that differ from the  
4 terms and conditions in the existing Qwest/Covad ICA. For example, there can be no dispute that  
5 the current Qwest/Covad ICA that was in effect on June 15, 2004, does not require Qwest to  
6 perform any commingling. There is, therefore, no "legal obligation" or "term and condition"  
7 relating to access to enterprise market loops, dedicated transport, or switching that requires Qwest  
8 to commingle these elements. A requirement in the ICA at issue in this arbitration for Qwest to  
9 commingle these elements with any other elements or services would be a new term and condition  
10 of access imposing a new legal obligation on Qwest. Under the express terms of the *Interim*  
11 *Unbundling Rules*, that requirement would alter the status quo and is therefore impermissible.  
12  
13 Commingling is but one example of how Covad's ICA proposals may deviate from the terms and  
14 conditions in the existing Qwest/Covad ICA. Before the Commission adopts any of Covad's  
15 proposals relating to access to enterprise market loops, dedicated transport, or switching, it will be  
16 necessary to compare the proposals to the terms and conditions in the existing ICA.  
17  
18

19 \_\_\_\_\_  
20 (footnote continued from previous page)

21 <sup>5</sup> *Id.* at ¶ 26.

22 <sup>6</sup> The FCC established three exceptions under which rates, terms, and conditions may differ from those in ICAs as of  
23 June 15, 2004: "(1) voluntarily negotiated agreements; (2) an intervening [FCC] order affecting specific unbundling  
24 obligations (e.g., an order addressing a pending petition for reconsideration); or (3) (with respect to rates only) a state  
25 public utility commission order raising the rates for network elements." *Id.* None of these exceptions applies here.  
26 First, the agreement under consideration in this proceeding is an arbitrated interconnection agreement, not the type of  
voluntary commercial agreement that is the focus of the first exception. *See Interim Unbundling Rules and*  
*Unbundling NPRM* at ¶ 21 and n. 58 (explaining that this exception applies to "voluntarily negotiated agreements" of  
the type resulting from the FCC's call for the industry to engage in good faith negotiations of commercial  
arrangements). Second, there are no intervening FCC orders relating to unbundling obligations nor UNE rate  
increases at issue in this proceeding.

1 Accordingly, in the course of this arbitration, the parties and the Commission should compare the  
2 proposed ICA language with the terms and conditions in the existing ICA. Further, at a  
3 minimum, the Commission should order the parties to include language in the ICA being  
4 arbitrated establishing that any commingling required by the agreement being arbitrated does not  
5 include any commingling of enterprise market loops, dedicated transport, or switching.  
6

7 **B. The FCC's Impending Issuance Of Final Unbundling Rules Supports**  
8 **Rejecting Covad's Unlimited Demands For Access To Network Elements.**

9 As noted, the FCC expressed its intent in the *Unbundling NPRM* to formulate permanent  
10 unbundling rules "on an expedited basis."<sup>7</sup> The likelihood of impermissible conflicts between  
11 Covad's unbundling proposals and the FCC's impairment determinations has risen substantially  
12 with the FCC's issuance of the *Unbundling NPRM* and the FCC's expressed objective of  
13 expeditiously establishing final unbundling rules. Given the D.C. Circuit's vacatur of substantial  
14 portions of the FCC's unbundling rules and the court's findings in both *USTA I* and *USTA II* that  
15 the FCC has misapplied the impairment standard, there is at least a reasonable likelihood that the  
16 final unbundling rules will require less network unbundling than the *TRO* imposed. In contrast to  
17 this probable decrease in federally imposed unbundling requirements, Covad's language seeks to  
18 expand Qwest's unbundling obligations without any meaningful limits and far beyond what the  
19 FCC required in the *TRO*. In other words, Covad is headed in a direction precisely opposite to  
20 that the FCC is apparently taking, resulting in a high probability of impermissible conflicts with  
21 federal unbundling laws if the Commission were to adopt Covad's language.

22 In these circumstances, Qwest respectfully suggests that the prudent course for the Commission is  
23 to reject Covad's aggressive unbundling demands while the FCC formulates final unbundling  
24 rules. This path recognizes the deference that must be given to the FCC as the regulatory body

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25 <sup>7</sup> *Interim Unbundling Rules and Unbundling NPRM* at ¶ 18.  
26

1 with primary responsibility for administering the Act. As the Eighth Circuit has stated, "[t]he new  
2 regime for regulating competition in this industry is federal in nature . . . and while Congress has  
3 chosen to retain a significant role for state commissions, *the scope of that role is measured by*  
4 *federal, not state law.*"<sup>8</sup> To avoid impermissible conflicts, the federal law relating to unbundling  
5 should be known and established before a state commission should even consider imposing the  
6 type of far-reaching unbundling obligations that Covad proposes.

7  
8 RESPECTFULLY SUBMITTED this 29th day of September, 2004.

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<sup>8</sup> *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946-47 (8<sup>th</sup> Cir. 2000) (emphasis added).

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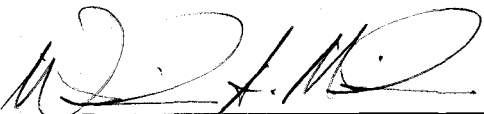
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